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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WILLIAM H. SAGE, HENRY M. SAGE, AND James Fenimore Cooper, executors of the last will and testament of Dean Sage, deceased, appellants,
v.
THE UNITED STATES.
No. 344.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On January 23, 1917, appellants, as executors of the last will and testament of Dean Sage, filed in the Court of Claims their original petition, and on May 7, 1917, their amended petition, seeking to recover from the United States the sum of $33,665.39 (being the unrecovered balance of a total sum of $63,940.88), paid on June 25, 1903, as a tax on the interest of the legatees of the deceased in his personal estate (R. 1–11).

The case was heard and decided upon a demurrer to the amended petition, which was sustained.

The amended petition alleged that Dean Sage, a resident of Menands, Albany County, New York, died on June 23, 1902, leaving a valid will and codicil bequeathing his personal estate to his widow and five children; that said will and codicil were duly admitted to probate and record by the Surrogate's Court for said county, and that letters testamentary were issued to appellants who were named as executors therein (R. 3).

On July 1, 1902, the debts of decedent and the expenses of administration were unascertained and unpaid (R. 4).

On June 25, 1903, the United States Internal Revenue Collector for the Fourteenth District of New York collected from appellants as the tax due on the interest of said legatees in said estate the sum of $63,940.88. It was demanded under section 29 of the Act of Congress approved June 13, 1898, ch. 448, 30 Stat., 448, entitled "'An act to provide ways and means to meet war expenditures and for other purposes,'" and amendments. The tax was paid under protest and was by the collector covered into the Treasury of the United States in the ordinary course of business (R. 4).

On August 24, 1903, application was made to the Commissioner of Internal Revenue for a refund of the tax collected from them, which application was denied. On September 19, 1905, appellants brought suit in the United States Circuit Court for the Northern District of New York against John G. Ward, Collector of Internal Revenue, to recover said

$63,940.88. On May 17, 1912, they obtained judgment for $30,275.49, with interest and costs, which was satisfied by the United States (R. 4–5).

Thereafter, on or about September 7, 1916, appellants made application to the Secretary of the Treasury for repayment of the difference between the tax collected and the amount of said judgment, to-wit, $33,665.39. On October 30, 1916, said application was rejected on the ground that, since the whole amount of the tax was involved in the suit against the collector in New York, the claim for the remainder of said tax must be deemed to be merged in the judgment recovered therein (R. 5). Whereupon the present suit was brought.

The amended petition was demurred to on the grounds that it showed (*a*) that the subject matter of the suit has been previously adjudicated, and (*b*) that the claim is barred by the statute of limitations. The demurrer was sustained and the petition dismissed, the judgment not stating the ground of decision (R. 11). From said judgment this appeal is prosecuted.

ARGUMENT.

I.

The appellants' petition shows that recovery in this case is barred by the judgment obtained in the suit against the Collector of Internal Revenue in 1912

The petition in this case recites that in August, 1903, appellants presented their claim to the Commissioner of Internal Revenue for the refund of the full amount of the tax collected from them

($63,490.88); that in September, 1905, they brought suit in the United States Circuit Court against John G. Ward, "as such collector," to recover said amount, and that in May, 1912, they recovered judgment in said suit against Ward for $30,275.49, "which judgment was satisfied by the United States." (R. 4–5.)

These allegations constitute a clear admission that the subject matter of the former suit was identical with the subject matter of the present suit. The ground of the present suit is that the taxes in question were erroneously collected on "contingent beneficial interests" contrary to the Act of June 27, 1902. Since the latter act was in force at the time the former suit was brought it can only be presumed that the suit was based on the same ground. But whether it was or not is immaterial since the subject matter of the suit was the same.

As said by this court in *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 130–131:

> The question as to [a] judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what is pleaded or litigated, but what could have been pleaded or litigated.

And in *The Haytian Republic*, 154 U. S. 118, 125, the court quoted from the opinion in *Stark* v. *Starr*, 94 U. S. 477, 485, as follows:

> It is undoubtedly a settled question that a party seeking to enforce a claim legal or equitable must present to the court, either

by the pleadings or proofs, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail.

II.

The report of said case in the Circuit Court of Appeals shows that the subject matter was identical with the subject matter of the present suit.

From the decision of the Circuit Court of Appeals for the second circuit in the case against the collector of internal revenue (*Ward* v. *Sage*, 185 Fed. 7) it conclusively appears that the subject matter of said suit was identical with the subject matter of the present suit.

The case recites that the tax which is the subject-matter of this suit was paid to the collector. The same recitals as to demand for and refusal of a refund are made. The prayer is for a judgment for the entire amount of the tax.

The decision states the items composing this entire sum of said tax, to wit, $63,940.88. The decision below found in favor of the plaintiffs, Sage *et al.*, for the entire amount of the taxes sued for. The Circuit Court of Appeals reversed this judgment, holding that the plaintiffs were entitled to recover back of said entire sum of $63,940.88 the sum of $30,275.49, and that they were not entitled to recover the sum of

$33,665.39—the portion of said tax which the plaintiffs are again seeking to recover in the present suit.

The decision of the lower court upon the retrial is not reported and the only information in relation thereto is the admitted fact that judgment was entered against the collector for $30,275.49, and paid by the United States.

The lower court, however, entered its judgment in order to take the further proceedings not inconsistent with the opinion of the Circuit Court of Appeals which the mandate directed, and the legal effect of that judgment was to adjudicate two things:

1st. That there was due from the United States to the plaintiffs under section 3 of the Act of 1902 the sum of $30,275.49.

2nd. That plaintiffs were not entitled to recover the further sum of $33,665.39.

III.

The suit against the Collector was in effect a suit against the United States.

It is suggested, however, that although the subject matter of the two suits may be the same, the parties are different, and that the United States can not avail itself of a judgment entered against a collector of internal revenue.

While the United States was not *eo nomine* a party to the record, the former suit obviously was in effect a suit against the United States, under statutes authorizing it to be so brought, and the least that

can possibly be said is that the United States was a privy to the suit. The requirements of the doctrine of *res judicata* therefore are amply met.

While there undoubtedly exists at common law a right of action against a tax collector to recover sums wrongfully collected and paid under protest, such a suit when brought against a collector of internal revenue is in substance a suit against the United States, the Government by the statutes having consented to be sued in the name of the collector. This conclusion follows from a consideration of the provisions of the statutes relating to such suits.

By section 3210 of the Revised Statutes collectors are required to pay all sums collected daily into the Treasury of the United States. By sections 3220 and 3229 the Commissioner of Internal Revenue is authorized to refund upon application any and all sums wrongfully collected, and, with the advice and consent of the Secretary of the Treasury and the Attorney General, to compromise all suits and prosecutions growing out of the revenue laws. By section 3226 it is provided that no suit shall be maintained in any court for the recovery of any internal taxes alleged to have been wrongfully collected until appeal shall have been duly made to the Commissioner of Internal Revenue. And by section 989 it is provided that when a recovery is had against a collector, and the court certifies that there was probable cause for the act done by the collector, the amount so recovered shall be paid by the United States.

The system so provided is thus described in the case of *State Railroad Taxes*, 92 U. S. 575, 613:

> The Government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer.

In the recent case of *Crocker et al.* v. *Malley*, decided March 17, 1919, this court clearly held that a judgment against a collector of internal revenue is in effect a judgment against the United States, and that the United States is estopped thereby. The collector having erroneously assessed the plaintiffs as an *association* under the Income Tax Act of October 3, 1913, the question arose whether he might retain out of the money so collected the lesser sum for which plaintiffs were liable as *trustees*. On this point the court said:

> The recovery therefore will be from the United States. * * * If the United States retains from the amount received by it the amount that it should have received, it can not recover that sum in a subsequent suit.

In *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 733, the court, in referring to the statutes which authorized and directed the repayment to collectors

of sums of money recovered against them in any court for taxes alleged to have been erroneously or illegally collected, said:

> Clear implication of the several provisions is, that a judgment against the collector in such a case is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source.

And in *Andreae* v. *Redfield*, 98 U. S. 225, 233, the court said:

> Where the collector acts under antecedent directions from the proper source, it is clear that the suit is in the nature of a suit against the United States.

IV.

The claim for $33,665.39 not having been presented to the Commissioner of Internal Revenue prior to January 1, 1914, is barred by the Act of July 27, 1912.

The argument in support of the application of the Act of July 27, 1912, is developed at length in the Government's brief in the *Coleman Case*, No. 343, October Term, 1918, immediately preceding this case. (See Heads I, II, III, IV.) To avoid repetition reference is made thereto with the request that it be taken as a part of the present brief.

V.

The claim filed in August, 1903, can not be the basis of the present suit. That claim was merged into and extinguished by the judgment.

Appellants seek to escape the bar of the Act of July 27, 1912, by contending that, since section 2 of said act refers to claimants who "have presented" as well as to claimants who "shall hereafter" present their claims, the act had the effect to revive the claim filed by them on August 24, 1903, and that, therefore, their claim was filed within the time prescribed by section 1.

The former claim purported to be filed under section 3220 of the Revised Statutes and was for the full amount of the tax collected, $63,940.88. But that claim can not be relied on as the basis of the present suit. The present suit is for the difference between the amount of the judgment recovered on the former claim and the whole amount of the tax, viz, $33,665.39, and no claim for this amount has ever been presented to the Commissioner of Internal Revenue, although application for the payment thereof was made to the Secretary of the Treasury on September 7, 1916.

The obvious answer to the contention is that the former claim was filed simply as an essential prerequisite to the bringing of a suit against the collector of internal revenue (see section 3226, R. S.), and was merged into and extinguished by the judgment recovered in that suit. (*Supra*, pp. 3–9.)

VI.

No claim presented by the appellants, or any of them, was pending on file when the Act of July 27, 1912, was passed. None has been filed since. The claim therefore could not be considered.

The claim for $63,940.88 filed on August 24, 1903, had been rejected by the Commissioner of Internal Revenue. Its office as a claim for allowance had been terminated by the action of the commissioner.

If it be contended that the purpose of the Act of 1912 was to give to holders of claims the right to have those filed or to be filed prior to January 1st, 1914 paid by the Secretary of the Treasury, clearly there was no provision that a claim filed which had been rejected and on which suit had been brought and the judgment rendered thereon satisfied by the United States should be treated as a pending claim.

If the portion rejected as a valid claim in that suit could be again asserted by virtue of the Act of 1912, clearly a claim for that portion must be presented, not only because claimants insist it is different from the claim as an entirety and severable, but because the former claim filed was no longer pending but had been acted on and terminated as a claim.

It would be straining the language of Section 2 of the Act, taken alone, as indicating that it applied to and covered a claim which had been acted on in August, 1903, and rejected as not owed by the United States.

VII.

If the present suit be regarded as based on the claim filed in August, 1903, then the suit is itself barred by the limitation contained in section 1069 of the Revised Statutes.

Section 3 of the Act of June 27, 1902, c. 1160, 32 Stat. 406, under which recovery is sought, provides a standing appropriation for the payment of claims for the refund of taxes collected under section 29 of the War Revenue Act upon "contingent beneficial interests" which did not vest in possession and enjoyment prior to July 1, 1902. The appropriation is in the nature of a trust fund held by the United States for the use and benefit of claimants of the specified class to be paid over upon the presentation of their claims. (See opinion of the Attorney General in *The Daley Case*, 26 Ops. Atty. Gen. 194, 197, quoted in *Fidelity Trust Co.* v. *United States*, 45 Ct. Cls. 362, 367, and cited in *United States* v. *Shipley*, 197 Fed. 265, 273.)

Claims under this provision being payable on presentation, it follows that the "claim [i. e. cause of action] first accrues" when the application for refund is made within the meaning of section 1069 of the Revised Statutes (Judicial Code Sec. 156), which provides that "every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition * * * is filed in this Court * * * within six years after the claim first accrues."

United States v. *Taylor*, 104 U. S. 216, involved an application under the Act of August 5, 1861, c. 45, 12 Stat. 282, for the refund of the surplus proceeds of a sale of land sold for direct taxes due the United States. The act provided that such surplus proceeds should be deposited in the Treasury for the use of the owners of the land, to be paid over to such owners upon presentation of their claims. Claimant presented her claim approximately ten years after the sale of her property, and brought her suit in the Court of Claims within one year after the rejection of her claim. The court held that the limitation of section 1069 of the Revised Statutes did not begin to run until she presented her claim, saying:

> * * * the right of the owner of the land to recover the money which the Government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of the demand, it falls within the terms of the section * * * and is not cut off by the lapse of time (p. 222).

This decision has been many times cited and followed (*United States* v. *Cooper* 120 U. S. 124, 126; *Rice* v. *United States*, 122 U. S. 611, 620; s. c. 21 Ct. Cls. 413, 423), and the principle has been held to apply to statutes making a standing appropriation for the payment of claims as well as to statutes creating an express trust (*United States* v. *Wardwell*, 172 U. S.

48; *Simons* v. *United States*, 19 Ct. Cls. 601, 609–10; *Harrison* v. *United States*, 20 Ct. Cls. 175, 179–81; *Wayne, Admr.* v. *United States*, 26 Ct. Cls. 274, 288–89).

It can not be assumed that a claim made in time for suit, and acted on by the department in time for suit, and barred by the statute, was intended to be revived by this Act of 1912, even if no suit had been brought on this claim, such as was brought, and the substantial judgment rendered thereon paid by the United States. *United States* v. *Pennington*, 231 U. S. 631.

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

ALEX. C. KING,
Solicitor General.

APRIL, 1919.

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